STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 93-054

TUSTIN FIRE STATION (TUSTIN RANCH)

I.

INTRODUCTION AND PROCEDURAL HISTORY

In 1986, The Irvine Company ("TIC") and the City of Tustin entered into a lengthy and complex agreement regarding commercial and residential development of 2,000 acres of land owned by TIC within the City of Tustin. As one aspect of this agreement, the parties agreed that TIC would set aside approximately one acre within the larger area (known as the "Tustin Ranch") on which to build a fire station; this would be conveyed to the City upon completion. TIC and the City also agreed that the City would reimburse TIC for the costs of construction of the station. The agreement left to future negotiations selection of the means by which the reimbursement was to be accomplished. During the next few years, the City and TIC entered into several supplemental agreements.

In October 1993, shortly before construction of the fire station was to begin, a complaint was filed by the Los Angeles and Orange County Building and Construction Trades Council, asking the Department of Industrial Relations ("Department") to apply the prevailing wage laws to construction of the fire station. On November 3, 1993, TIC requested a coverage

determination from the Director of Industrial Relations, arguing that the fire station construction should not be viewed as a public work within the meaning of Labor Code Section 1720 et. seq.

On April 15, 1994, the Director issued a public works coverage determination finding that the fire station construction is a public works project within the meaning of Section 1720. Timely appeals from this determination were then filed by TIC, by general contractor R.D. Olson Construction, and by Raetec Engineering Inc. a sub-contractor on the project. Counsel for TIC requested a hearing before the Director.

For the reasons set forth below, the request for hearing is denied and the initial public works coverage determination is affirmed.

II.

ISSUES TO BE DECIDED

Contentions on Appeal

A. The payments made by the City of Tustin to reimburse TIC for costs of the fire station construction are not "public funds" within the meaning of Labor Code Section 1720 because of the source and nature of the funds.

B. The circumstances here are essentially the same as those in other public works coverage cases in which developers made the initial payments for construction of a building later conveyed to a public entity, and in which the Director determined that the projects were not public works.

C. Because the construction project proceeded on the assumption that payment of prevailing wages was not required and

is now completed, prevailing wage requirements should not be applied in this case.

Conclusions on Appeal

A. The payments made by the City of Tustin, reimbursing TIC for the cost of the fire station construction, are "public funds" within the meaning of Labor Code Section 1720. The method by which the City collected the money designated for the fire station does not require a different conclusion.

B. The coverage determination here is consistent with past coverage determinations.

C. Estoppel and "fairness" considerations related to the timing of the issuance of the coverage determination do not require reversal of the initial determination.

III.
FACTS

The "East Tustin Development Agreement" between the City of Tustin and TIC, adopted November 3, 1986, includes the following provisions:

> 1.10 Fire Protection Facility The City has determined the need for an additional fire protection facility to serve the East Tustin area .... Developer shall make available to City without cost to City a parcel of land (not to exceed one acre in area) adequate to support a facility of 8,000 square feet. Developer shall provide for the construction of that facility per City standards and the acquisition of a new engine pumper for that facility at total costs not to exceed $1.3 million in 1986 dollars, excluding land. Acquisition of the land and engine-pumper and construction of the fire facility may be financed through the formation of a Mello-Roos district or other similar assessment or special tax district, or through fee programs as may be adopted by the City, payable upon issuance of building permits, to finance such acquisition and construction ...

On March 7, 1988, the Tustin City Council adopted Resolution No. 88-12, imposing a building fee on each parcel within the over-all East Tustin area, which is the subject of the 1986 agreement. The resolution included the following:

> I. The City Council finds and determines as follows:
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> A. The Development Agreement authorizes the establishment of a fee program to finance the following TIC obligations to fund improvements that will serve the East Tustin Specific Plan Area:
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> 1. Fire protection facility and new engine pumper at a cost of $1.3 million, in 1986 dollars ...
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> B. The City, in conjunction with TIC, has considered methods available to finance the foregoing TIC obligations and has determined that the most equitable means of funding would be through a program of fees, payable upon issuance of building permits.
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> II. All private development within the East Tustin Specific Plan area shall be required to pay fees, prior to the issuance of building permits, to fund a fire-protection facility and engine pumper .... The method used of calculating how much a specific project must pay in fees shall be shown in Exhibits A, B and C attached hereto ...

Attached to the resolution are a series of tables, identifying various "tracts," "sectors" and "lots" within the over-all area, and assigning to each a specific cost for the "fire protection facility and equipment." The total of the costs assigned to the tracts, sectors and lots is $1,300,000. The costs are tied directly to the acreage of each tract, sector or lot; the cost for each property is a proportionate percentage of $1.3 million.

On September 10, 1990, the City and TIC entered into a "Reimbursement Agreement for Dedication and Construction of a

Fire Protection Facility and Purchase of a New Engine Pumper." On September 15, 1993, the City and TIC entered into a "First Amendment to Reimbursement Agreement for Dedication and Construction of a Fire Protection Facility and Purchase of a New Engine Pumper." This last agreement included the following provision:

> Section 2 ...
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> b. City shall reimburse and pay to Company the full amount of City Fees collected by the City for costs incurred by Company in the design and construction of the Project in accordance with the terms of this Agreement. The City shall not have any obligation to reimburse the Company for any costs incurred for design and construction of the Project, which exceed the total amount of City Fees ultimately collected for the Project, less the cost of the purchase of the Fire Engine and provided herein ...
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> d. Upon completion of the Project, City shall pay to the Company any and all City Fees collected by City for the Project which have not been previously reimbursed by the City to the Company for the costs of design and construction of the Project pursuant to Section 2a above and which have not been expended by City in the purchase of the Fire Engine pursuant to Section 4 below. In addition, City shall subsequently pay to the Company any City Fees collected for the Project after completion of the Project ...

The 1986 Development Agreement permitted TIC to enter into agreements with other businesses to carry out the development contemplated by the agreement. By the time the Director issued the coverage determination from which this appeal was taken, TIC had entered into such arrangements with other business entities. The City had collected fees of $800,000 from TIC and from these other developers. The City had reimbursed TIC in the amount of

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approximately $100,000 pursuant to their agreement on the subject.

The construction contract between TIC and the general contractor was agreed to on October 18, 1993. It identified a series of sub-contractors. The Notice to Proceed from the City of Tustin to the contractor was dated the same day. As noted above, the initial request by TIC for a coverage determination was included in a letter dated November 3, 1993, 16 days later. That letter noted that the ground preparation for the project had begun, although actual construction had not yet begun.

There is no indication in any of the information presented to the Department that the City of Tustin or any other public agency advised TIC or its contractors that the project was exempt from the prevailing wage laws.

At various times between mid-November 1993 and early February 1994 there was correspondence to counsel for TIC and to the City of Tustin, and telephone requests for information by the Department.

Since issuance of the determination letter on April 15, we have been advised by the general contractor that construction of the fire station was completed April 28.[1]

IV.

DISCUSSION

A. No hearing is required.

8 CCR section 16002.5(b) states that: "The decision to hold a hearing is within the Director's sole discretion." In the interest of conserving the resources of both the Department and

[1]We have not been advised as to whether a notice of completion has been filed with the county recorder, or whether the city has accepted the fire station. See Labor Code section 1775.

the interested parties, hearings are generally not held in appeals of public works coverage determinations unless one is necessary to resolve substantial disputes as to material facts. The facts recited above are not in dispute, nor has any party asserted that any of these facts has changed since the initial coverage determination issued. The appellants do not challenge the determination's finding of facts, but rather the way the law was applied to the undisputed facts. Since the issues to be decided are essentially legal issues, no hearing is necessary, and the appeal is decided herein on the basis of the evidence previously submitted.

B. The fire station was paid for in part with the use of "public funds" within the meaning of Labor Code section 1720 et. seq.

It is undisputed that: (1) the City of Tustin is obligated to make payments to TIC to reimburse TIC for the cost of constructing the fire station; (2) the City has made such payments; and, (3) the source of these payments is money collected by the City in the form of building fees imposed by the City upon the developers within the "East Tustin Specific Plan" area. On appeal, TIC and R.D. Olson Construction contend that, because the sole source of these payments by the City is building fees imposed by the City on developers who undertake projects within the East Tustin area, these funds cannot be considered "public funds" within the meaning of Labor Code section 1720.

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TIC argues that the building fees were adopted by the City under its "police" power rather than under the City's taxation powers. It also argues that the City had no discretion how to use these funds because it was obligated, by its agreements with TIC, and by the terms of its 1988 resolution, to spend all money collected to reimburse TIC for the fire station construction costs. From these circumstances, TIC argues, the money raised cannot be viewed as "public funds" within the meaning of Labor Code section 1720. This argument is rejected for the following reasons:

Neither Labor Code section 1720 nor any related statutory provision includes a definition of "public funds." The Department's regulations (8 California Code of Regulations section 16000) include the following definition of "public funds":

"Includes state, local and/or federal monies." The regulation makes no distinction between money raised by a government by means of taxes and money received by a government entity or agency by any other means.

Prior public works coverage determinations of this Department have found government expenditures to be public funds without regard to whether the money spent was acquired by the government entities through their power of taxation or by some other means. Among the examples are the following:

In Calexico Airport Hangar (PWCD #92-034, Jan. 25, 1993), it was held that construction paid for by funds collected by the

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City of Calexico as insurance policy proceeds to pay for the replacement of buildings that were damaged by fire, was within the definition of a public work.

In Fallen Leaf Community Services District (PWCD #93-009, June 30, 1993), it was held that the construction of a storage structure by the District, using funds donated by a private party or parties, was a "public work." The coverage letter includes the following statement:

> "While the funds are originally private in nature, they are placed in the public coffers under the direct control and disposal of the district, making them public funds."

In Shasta Gateway Industrial Park (PWCD #92-022, September 16, 1992), California prevailing wage laws were found to be applicable when a local district undertook a public works project which was ultimately to be paid for by one or more federal agencies. The fact that the money was not raised by a state or local tax of any kind did not exempt the project from the state's prevailing wage requirements.

Thus, when money collected for, or in the coffers of, a public entity is spent on a project that falls within the definition of a "public work," prevailing wage obligations attach.

Although no reported appellate decision has ruled on the specific question presented here, McIntosh v. Aubry (Pricor Inc.), 14 Cal.App.4th 1576, 18 Cal.Rptr.2d 680 (1993) acknowledges that one way to recognize "public funds" is to determine whether the money spent comes out of public coffers. McIntosh held that a County's forbearance from both collection

of land rent and collection of payments normally made to the County by builders during the construction process does not amount to payment of public funds:

> We hold that the cost waivers were not public funds paid for construction .... Like the forbearance of rent, these "costs" involve no payment of funds out of county coffers. (Emphasis added) (Id. at page 1590)
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> With respect to the forbearance of rent, the court noted:
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> The word "funds" is not specially defined in the statute but has a well-established meaning in common parlance .... The dictionary defines it as "available pecuniary resources ordinarily including cash and negotiable paper ...." [internal quotation marks and citation omitted] (Id. at p. 1588).

The TIC appeal letter cites several California decisions comparing taxes and fees assessed by cities. None of the decisions touches on the central issue in this case, or carries any significant implications for the decision required here. Trent Meredith Inc. v. City of Oxnard, 114 Cal.App.3d 317, 170 Cal.Rptr. 685 (1981) decided whether a city ordinance requiring a property developer either to pay fees or dedicate land to a local school district was not an ad valorem tax, and therefore was not subject to the limitations in Article 13A of the California Constitution. The decision says nothing about the implications of the fee/tax dichotomy for other purposes, including public works. In Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986), the Court of Appeals considered whether a county's construction of a sewage system, issuance of bonds, and assessments of costs upon the property owners within the district should be viewed as a "taking" within the meaning

of Article XIV of the Constitution. In analyzing whether the construction of an improvement from which the landowner derives no benefit amounts to a "taking," the court recognized that some such undertakings have been compelled by the government, while others are private investments voluntarily undertaken, with the assistance of the government. The Court ultimately decided that construction of the sewage system in the particular case was not a taking. The decision, however, carries no implications for whether the money raised by means of development fees is properly viewed as "public funds" when spent for construction of a building intended for use by a public entity.

C. The reimbursement provisions in the agreements bring this project within the meaning of a "public work" and distinguish it from others cited by TIC in its appeal.

A recent coverage determination held that where a city redevelopment agency agrees to reimburse a developer for the costs of grading work and off-site improvements needed for a planned shopping mall, the improvement projects are "public works" within the meaning of Labor Code section 1720 and prevailing wage laws apply.[2]

In other prior determination letters, it has been held that the character of the funds used to pay for a project is dependent on the identity of the entity that bears the ultimate burden of paying for the project. When a public agency lends public money to a private entity, and the private entity agrees

[2] Wal Mart Shopping Center, Lake Elsinore (PWCD # 93-012, March 28, 1994). Similarly, in Redevelopment Agency of the City of Torrance (PWCD #93-023, October 4, 1993), it was decided that a public agency's reimbursement of the construction costs of a private entity for street, sewer line and water line improvements brought that work within the definition of "public work" within the meaning of Labor Code Section 1720. Payment of prevailing wages was not required in that case because the city is a charter city, which had chosen to exempt itself from the operation of the state's prevailing wage laws.

to repay the loan, the money loses its identity as public funds, inasmuch as it is the lender, rather than the public entity, that ultimately bears the cost of the construction project.[3]

TIC's appeal letter cites three previous public works coverage determinations, but relies primarily on Rancho Santa Margarita Company (May 12, 1986).[4] In that determination, the issue that was decided was whether the developer of a subdivision, who had agreed to construct a fire station and library for dedication to the county, could properly be viewed as an agent of the county. The Director in that case determined that the arrangement did not "constitute the appointment of the developer as the county's agent or construction manager." In contrast, the coverage determination letter issued in the present case did not consider whether the City of Tustin and TIC had an agency relationship. The coverage determination issued here turned on the evidence that the City had agreed to reimburse TIC for the fire station construction, and had taken steps to carry out that promise. This decision on appeal, likewise, is based on the reimbursement agreement and not on any agency theory.

In its appeal, TIC argues that the circumstances in the Rancho Santa Margarita case are exactly parallel to the circumstances in the present case. On the contrary, the parallel breaks down at the crucial point. At the time of the

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[3] See, e.g., Iceflow Athletic Complex, Co-generation Plant (PWCD #94-006, March 17, 1994); Avenida España Gardens Project, (PWCD #93-051, March 25, 1994) and the cases cited in each of those.

[4] The two other determination letters cited by TIC are City of Atascadero Fire Station No. 2 (July 31, 1987) and IDM Corporation Offsite Improvements Dedication (July 10, 1987). However, as the initial determination letter in this case noted, there was no indication or suggestion in either of those instances that the public agency had agreed to any obligation to repay the contractor that was bearing the initial cost. For that reason, those determination letters do not provide useful precedent here. In its appeal letter, TIC does not dispute our analysis of those two decisions.

decision in Rancho Santa Margarita, the County had made no promise to the developer that the County would reimburse the developer for the costs of construction of the two buildings. In this case, the City and TIC reached an agreement in 1986 that the City would reimburse the company for the costs of construction, with the specific method of raising the funds for reimbursement left unspecified. Thus, it is not correct, as TIC asserts in its appeal letter, that the factual circumstances in the two instances are parallel. It is not correct that construction of the fire station was done "at no cost" to the City of Tustin.

TIC states in its appeal letter that in Rancho Santa Margarita, "the County acknowledged that it might assist Rancho Santa Margarita in fulfilling its obligation for the fire station as a funding conduit through, in that instance, a possible Mello-Roos District." [emphasis added]. However, there is no indication in the Rancho Santa Margarita determination letter that the County had in fact formed a Mello-Roos district, or had promised to form a Mello-Roos district, or had agreed that once such a district were to be formed, the developer's construction costs would be reimbursed by funds raised by the district. The only comment in the letter regarding a Mello-Roos district is the following:

> Since the element of a publicly awarded construction contract is missing, the question of the significance of the potential reimbursement out of public funds by creation of a Mello-Roos Community Facilities District becomes moot. [emphasis added].

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Thus, the Rancho Santa Margarita coverage determination letter specifically reserved decision concerning the significance of repayment to the contractor by the county, if repayment was later arranged. Inasmuch as the decision did not consider the significance of potential repayment of the construction cost by the public agency, it cannot be taken as precedent on the issue to be decided here.

D. Applicability of the ruling in the present case.

All three appellants urge the Department not to apply the prevailing wage laws in the present case because the project has been completed. Appellant R.D. Olson Construction argues that by not issuing the initial coverage determination until April 15, the Director "waived your right to declare this project a public work of improvement, and that by doing so at this later time, you have abused your discretion in creating an inequitable and unconscionable result."

The factual circumstances here do not warrant a Department decision to refrain from applying the prevailing wage laws. As noted above, TIC and the general contractor entered into the construction agreement on October 18, 1993. The first request for a coverage determination was made by TIC on November 3, 1993, 16 days later. Thus, neither the City of Tustin, TIC, the general contractor nor any sub-contractor sought a prevailing wage coverage determination from this Department prior to negotiation of the contract, the signing of the construction contract, or commencement of the work.

Second, TIC was aware that the project would be paid for by public funds, through the reimbursement mechanism. All parties

were aware that the project was a fire station intended for use by the City of Tustin, a public entity. The City Council resolution describing the reimbursement arrangement was sufficient to put all parties on notice of the public funding. No party has suggested it was advised, prior to negotiation of the contract or commencement of the work, that the prevailing wage laws would not apply to the project.

Third, the correspondence and telephone requests for information between this Department and TIC and the City during the period between November 1993 and February 1994 were a clear indication that the applicability of the prevailing wage laws was under active consideration by the Department.

As noted, the coverage determination letter was issued 13 days prior to completion of the project.[5]

Given the circumstances described above, it is determined that there is no reason to refrain from applying the prevailing wage laws to the project at issue here.

CONCLUSION

For the foregoing reasons, the appeals by The Irvine Company, R.D. Olson Construction, and Raetec Engineering Inc. of the Department's public works coverage determination are denied, and that determination is affirmed.

Date: 6/28/94

Lloyd W. Aubry, Jr., Director
Department of Industrial Relations

[5] Labor Code section 1775 permits the Director to enforce the prevailing wage laws even after completion of a project. In Lusardi Construction Company v. Aubry, 1 Cal.4th 976, 4 Cal.Rptr.2nd 837 (1992) and in Waters v. Division of Labor Standards Enforcement, 192 Cal.App.3d 635, 237 Cal.Rptr. 546 (1987) California courts have upheld the retroactive enforcement of the prevailing wage law requirements.